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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-864

CORPORATION FOR PUBLIC BROADCASTING, *Petitioner*,
v.
THE NETWORK PROJECT, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

**REPLY MEMORANDUM OF THE
CORPORATION FOR PUBLIC BROADCASTING**

THOMAS G. GHERARDI
General Counsel
Corporation for Public
Broadcasting
1111—16th Street, N.W.
Washington, D.C. 20036

JAMES L. McHUGH, JR.
MATTHEW J. ZINN
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Petitioner

Of Counsel:

STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

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1. Respondents have misunderstood or mischaracterized the narrow legal question presented to this Court. They assert (Brief in Opposition, p. 10) that the sole issue here is whether the Court of Appeals properly exercised its discretionary judgment¹ in concluding that the doctrine of pendent jurisdiction was applicable despite the pretrial dismissal of the jurisdiction-conferring claims. This is incorrect. As respondents elsewhere concede (Brief in Opposition, p.

¹ In making this assertion, respondents erroneously assume that the Court of Appeals, rather than the district court, has discretion in these matters.

16), the Court of Appeals did not evaluate the considerations of “judicial economy, convenience and fairness to litigants” which this Court has held must be taken into account in determining whether the pendent jurisdiction of a federal court is properly invoked. Instead, the court below promulgated a new and far-reaching rule of law which requires a federal court to exercise jurisdiction over pendent federal claims in the absence of exceptional circumstances justifying their dismissal. As the Court of Appeals stated (Petitioner’s Appendix, p. 14a), where the pendent “claim involved . . . is one of federal law, the reasons for the exercise of pendent jurisdiction are especially weighty, and exceptional circumstances [are] required to prevent the exercise.” In so holding, the court reversed—insofar as pendent federal claims are concerned—the normal presumption favoring the dismissal of pendent claims, absent special circumstances, when the jurisdictional claims cannot withstand a pretrial motion to dismiss. Thus, the question before this Court is not the propriety of a discretionary judgment, but the propriety of the rule of law fashioned by the Court of Appeals which, we believe, cannot be squared with the fundamental constitutional precept that the federal courts are courts of limited jurisdiction.

2. Recognizing that the Court of Appeals failed to articulate any factors supporting an exercise of pendent jurisdiction, save for the federal nature of their pendent claims, respondents contend that considerations of “judicial economy, convenience and fairness” do, indeed, underlie and justify the decision below. This contention is baseless as even a brief examination of the proceedings in the district court demonstrates. The district court dismissed respondents’ claims at the

earliest stage in the litigation process. Until that point, the parties had not engaged in any pleadings or proceedings other than those normally expected at the motion-to-dismiss stage. Indeed, as respondents themselves admit (Brief in Opposition, p. 4), discovery never commenced. Nor was there any extraordinary expenditure of judicial resources by the district court; the court did no more than evaluate the claims of the respective parties, as it was required to do, in granting petitioners' Rule 12(b)(6) motion.² In short, there were no special circumstances surrounding the district court's disposition of the case that would suggest that a departure from the *Gibbs*' principle was appropriate.

3. Contrary to respondents' contention, the question presented by this case has not been resolved by prior decisions of this Court.³ No decision of this Court has

² Contrary to respondents' claim, the fact that the district court considered their legal theories in passing on petitioners' motion to dismiss cannot support an exercise of pendent jurisdiction. If that sort of investment of judicial resources provided an adequate basis on which to assert such jurisdiction, a refusal to exercise pendent jurisdiction would rarely, if ever, be permissible.

³ Petitioner has previously demonstrated (Petition, pp. 9-11) that neither *Hagans v. Lavine*, 415 U.S. 528 (1974), nor *Rosado v. Wyman*, 397 U.S. 397 (1970), is in point. To be sure, both cases suggest that the federal nature of a pendent claim is a factor favoring the exercise of pendent jurisdiction. But, critically for present purposes, neither case holds that that factor, standing alone, justifies invocation of the doctrine of pendent jurisdiction.

Respondents' reliance on *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1958), is likewise misplaced. As noted in our petition (p. 11, n. 14), the court there had independent jurisdiction over both the "pendent" and "dominant" claims; the only question was whether the court could consider both claims in the same proceeding. Hence, the decision has no relevance to the issue presented here.

ever addressed the inherent conflict between a federal court's exercise of pendent jurisdiction over claims expressly excluded from its jurisdictional grant and Congress' power under Article III to define the jurisdiction of the lower federal courts. In many respects, the constitutional considerations raised by that conflict are identical to those which recently led the Court to prohibit a district court from exercising pendent party jurisdiction unless it was satisfied "that Congress in the statutes conferring jurisdiction [had] not expressly or by implication negated its existence." *Aldinger v. Howard*, 426 U.S. 1, 18 (1976). These constitutional considerations are equally compelling in the pendent federal claim context and demand the attention of the Court.

For these reasons, and those set forth previously, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS G. GHERARDI
General Counsel
Corporation for Public
Broadcasting
1111—16th Street, N.W.
Washington, D.C. 20036

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MATTHEW J. ZINN
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